

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: NATIONAL COLLEGIATE) Docket No. 13 C 9116
ATHLETIC ASSOCIATION STUDENT-)
ATHLETE CONCUSSION INJURY) Chicago, Illinois
LITIGATION,) February 5, 2014
) 10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE THE HONORABLE JOHN Z. LEE

APPEARANCES:

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1 (Proceedings had in open court:)

2 THE CLERK: 13 C 9116, National Collegiate Athletic
3 Association Student-Athlete Concussion Injury, for motion
4 hearing.

5 MS. FEGAN: Good morning, your Honor. Elizabeth Fegan
6 for the Arrington plaintiffs.

7 MR. EDELSON: Good morning, your Honor. Jay Edelson
8 for proposed intervenors for Frank Moore and Anthony Nichols.

9 MR. SCHARG: Good morning. Ari Scharg also on behalf
10 of the proposed intervenor Frank Moore and Mr. Nichols.

11 MS. SPELLMAN: Good morning, your Honor. Johanna
12 Spellman and Mark Mester on behalf of defendants NCAA.

13 MR. LEWIS: Good morning, your Honor. Richard Lewis
14 for the Walker and Morgan plaintiffs.

15 MS. CARROLL: Katrina Carroll also for the Walker and
16 Morgan plaintiffs.

17 MR. DeFEO: And Daniel DeFeo for the Vanzant and
18 Washington plaintiffs.

19 MS. NELSON: Melanie Nelson for the Arrington
20 plaintiffs.

21 MR. STEPHENS: And this is Matt Stephens on the phone
22 for the Hudson plaintiffs.

23 THE COURT: Good morning, everyone.

24 We are here on motion. But actually the timing was
25 apropos. As you all know, the last of the original cases that

1 were before the MDL and the petition, for lack of a better
2 word, for consolidation and transfer, the last case was finally
3 transferred to our court and hit our docket in the last week or
4 so. And I wanted to wait until at least the original cases all
5 came here before we proceeded with the matter in any general
6 matter.

7 I have and what will be going out today is a case
8 management order No. 1, probably the first of many. But the
9 case management order sets forth the date of the initial
10 pretrial conference as well as some basic procedures with
11 regard to the handling of this MDL litigation, as well as some
12 time frames for the Court to consider the appointment of
13 liaison counsel and lead counsels for the plaintiff. At this
14 point it's the Court's intention to appoint two counsel, two
15 attorneys, as lead counsel. But that will be -- and I set
16 forth the schedule of how that determination will be made.
17 Hopefully there will be some sort of consensus. But if not,
18 then I will have to decide that.

19 But basically that's all by way of preface to let you
20 know that the order should be hitting the docket today. I
21 actually hoped it would hit the docket before -- well, early
22 this morning. But due to various commute issues that wasn't
23 done. So in any rate, you can anticipate that.

24 With regard to the --

25 MS. FEGAN: Your Honor, Elizabeth Fegan.

1 On October 19, 2011, this Court already considered the
2 Rule 23(g) issues and appointed interim class counsel. We have
3 already invested over 3,000 hours in this case, hundreds of
4 thousands of dollars in expert costs. Both Hagens Berman as
5 well as Siprut are already appointed under the Rule 23(g) as an
6 interim class counsel.

7 THE COURT: No, I understand that. And that was with
8 regard to the Arrington matter. And that's certainly something
9 that the Court will consider and that you can raise if that's
10 something I need to consider and raise. Hopefully, like I
11 said, the plaintiffs can come to some sort of consensus or
12 agreement as to who those people would be. But if not, the
13 case management order sets forth the procedure by which the
14 Court can appoint lead counsel in that regard. And as I said,
15 you can raise those issues as part of that process if you need
16 to.

17 The date that I set for the initial pretrial
18 conference was, or is rather, March 5 at 2:00 p.m. I thought
19 setting it at 2:00 would give maximum opportunity for people
20 who are out of town to come into town if they so wish. Also
21 people can anticipate by phone if they wish as well. And
22 that's all set forth in the case management order.

23 I'll also let you know that the reason why I set that
24 date is that Magistrate Judge Brown also will be in attendance
25 so that she can observe those proceedings. Okay.

1 So that being said, so that's all by way of preface.
2 What brings us here today is the Walker and Morgan plaintiffs'
3 motion to temporarily enjoin the ongoing Arrington medical
4 monitoring class action negotiations with defendant NCAA.
5 There are also a spat of joinder motions. The joinder motions
6 are granted to the extent that they have been filed.

7 The motion to file excess pages is also granted up to
8 25 pages. But that really brings us to the main question,
9 which is, what is the status of that mediation process?

10 MS. FEGAN: Your Honor, we have engaged and retained
11 Honorable Layn Phillips, who is a retired federal Judge, as a
12 mediator. We have had multiple in-person sessions both with
13 the NCAA and Judge Phillips as well as with counsel for the
14 insurers. We have made significant progress.

15 MR. MESTER: Your Honor, we have another session --
16 session coming up that's been not easy to schedule in part
17 because of all the carriers that are involved and their
18 counsel. But we agree with Ms. Fegan. We made substantial
19 progress.

20 THE COURT: When is the next scheduled --

21 MR. MESTER: It's tomorrow in New York.

22 THE COURT: All right.

23 MS. FEGAN: Your Honor, may I?

24 THE COURT: Yes.

25 MS. FEGAN: I would suggest that in -- there is no

1 emergency here. Rule 23 protects all of the class members in
2 the event of a settlement. Rule 23 will require us to present
3 to this Court a motion for preliminary approval, which of
4 course all of these counsel can participate.

5 But more importantly to all the class members out
6 there, Rule 23 provides a process by which notice will be given
7 to all of the class members, so they will have the opportunity
8 to consider any settlement.

9 They will then have the opportunity to do one of three
10 things: They can object to the settlement, which I assume this
11 is kind of a preliminary objection process that counsel is
12 trying to engage in.

13 But two, they will have the opportunity to exclude
14 themselves from any settlement. And that opportunity is really
15 critical here because if individual players believe or former
16 or current NCAA student athletes believe that the settlement
17 somehow impinges on their rights or that they could do better
18 or get more, for example, they will have the opportunity to
19 exclude themselves from the settlement and pursue those
20 actions.

21 So Rule 23 has already built in a process by which
22 these very issues will be considered. It is really premature
23 at this point to consider those issues when there is no
24 settlement before the Court, one; and two, where counsel has
25 not even attempted to meet the standards for any injunction.

1 And under the threshold phase, which I know this Court
2 is very familiar with, there is three prongs: One, there must
3 be a likelihood of success on the merits. Two, there must be
4 irreparable harm. And three, the traditional legal remedy must
5 be inadequate.

6 So starting there with the traditional legal remedy,
7 Rule 23 already has in place a process by which these issues
8 will be decided if -- if we reach a settlement. But two, there
9 is no likelihood of success on the merits here for the movants.
10 That would require this Court to enter a mandatory injunction
11 requiring the NCAA to negotiate with someone else, with folks
12 who have not been in this case for three years, have not
13 invested the time and completed merits discovery, and filed a
14 motion for preliminary -- or for class certification together
15 with hundred pages of facts.

16 And so while they call it a temporary injunction or
17 asking you to temporarily enjoin the negotiations, they're
18 really asking for a mandatory injunction that requires specific
19 performance.

20 THE COURT: Counsel, why aren't the safeguards of Rule
21 23 sufficient?

22 MR. LEWIS: Your Honor, Richard Lewis for the -- for
23 Walker and Morgan. If I could response to that.

24 Your Honor, I think the issue is Rule 23 safeguards.
25 And Rule 23 safeguards, as made clear by Amchem and the cases

1 in our briefs, don't start after the settlement is reached.
2 They particularly apply to the settlement process.

3 And here we have an uncertified class that has not
4 been subject to the adversary process, that has not been
5 subject to judicial review. Amchem makes clear there is a
6 heightened standard of review by the Court over a settlement
7 when there is an uncertified class. And it makes clear that
8 there needs to be structural protections in the negotiation
9 process itself.

10 It is too late after parties make a deal where the
11 significant divergent interests of the class have not been
12 represented. In this case --

13 THE COURT: So let me ask you this: What are the
14 significant divergent interests of the class?

15 MR. LEWIS: Thank you, your Honor. There are two
16 specific divergent interests that are not represented by
17 Arrington counsel, according to Arrington counsel's own motion
18 for class certification.

19 When Arrington counsel moved for class cert, they took
20 their 50-state class that represented all living -- our
21 concerns is college football players, not the other sports.
22 And they narrowed it. And they said, we're only going to
23 represent people who played from 2004 to present. And we're
24 only going to seek certification for people who played in 18
25 states.

1 So they eliminated hundreds of thousands of former
2 college football players. And most interestingly, the ones who
3 have the greatest need for this medical monitoring, as is clear
4 from Dr. Stern's affidavit attached to our papers, the former
5 football players at greater risk are the ones now in their 30s,
6 40s and 50s. That's what the research shows.

7 THE COURT: My question, I guess, with regard to that
8 is, if the class is so defined and your class or those people,
9 individuals, aren't part of that class, why can't they pursue
10 their -- hold on. Let me get this question out, and then you
11 can answer it.

12 Why can't they pursue their own negotiations and their
13 own settlement and protect their own interests with regard to
14 the NCAA?

15 MR. LEWIS: Thank you, your Honor.

16 MR. MESTER: Your Honor, that -- I'm sorry. That
17 actually is the issue. We talked a lot about the procedure.
18 We talked a little substance.

19 From my clients' perspective, our interest in
20 settlement is to resolve the class claims once and for all. We
21 know darn well if we don't have an expansive class that covers
22 all sports and all the time periods and all jurisdictions, we
23 won't get peace. Our interest is to get peace.

24 We don't think these classes could be certified on a
25 contested basis. But from a settlement perspective, as we said

1 in the memorandum we submitted on the motion to intervene, the
2 only basis on which the NCA is going to settle is all sports
3 for all times and all jurisdictions. And that's been precisely
4 what's been discussed every mediation session we've had. that's
5 the only way we'll settle.

6 So in that sense, your Honor, from a substantive
7 perspective, the two constituencies that Mr. Lewis indicates he
8 is concerned about will be covered, will be eligible for
9 medical monitoring, just like everyone else. And if they
10 weren't, the NCA wouldn't enter into settlement because it
11 wouldn't achieve its purpose.

12 MS. FEGAN: And I think what's real clear here is --
13 to us is that we have not abandoned anyone. Our second amended
14 complaint, which is the operative pleading and which the NCAA
15 has said multiple times before the panel and others that it's
16 operative pleading, is unlimited in sports. It's not limited
17 to football players, and it's unlimited in time.

18 But what we had to do when we presented our best
19 effort to this Court on a contested motion for class
20 certification was put first our best foot forward, which is
21 exactly what counsel for the Morgan plaintiffs has previously
22 done. In fact, there is a case called Prempro, in which
23 counsel for the Morgan plaintiffs presented to the Court a very
24 narrowed 24-state medical monitoring class.

25 And there they explained why -- in their briefs, why

1 they did that: Because they were trying to get and exclude
2 from a liability perspective those states where it would be
3 difficult to get medical monitoring and narrow it to their
4 strongest states.

5 And so they did in the liability context exactly what
6 we did here in the liability context. That being said, your
7 Honor, in our motion for class certification, we did not
8 exclude the non-18 state plaintiffs. In fact, we did a
9 50-state core issue class, because the Seventh Circuit
10 recognizes that even were this Court not able to provide
11 damages or money remedies to a full class, it could still deal
12 with the issues of duty and breach by the NCAA.

13 And so we made sure that we put forth the strongest
14 liability case we could, but did not amend our second amended
15 complaint, as sometimes people do at the motion for class cert
16 stage, to ensure that the statute of limitations were still
17 tolled as to the remainder, knowing that if the NCAA ever
18 decided to talk it would want to talk about the whole.

19 That being said --

20 THE COURT: Let me ask you this, counsel: Then
21 assuming that a settlement is reached with the NCAA and outside
22 the context of the MDL, let's focus on the Arrington case.
23 Okay? So assuming that the Arrington plaintiffs were able to
24 negotiate a settlement for the NCAA, then for certification
25 purposes would the class then be modified to be more expansive

1 than the class as originally proposed by the Arrington
2 plaintiffs?

3 MS. FEGAN: The class will reflect the definition in
4 our second amended complaint, be consistent with that class
5 definition, which is all current and former student athletes at
6 the NCAA, not limited by sport and not limited in time.

7 THE COURT: So I guess the answer to my question then
8 is, yes. Then the class definition would be different and
9 broader than the class that was proposed by the Arrington
10 plaintiffs as part of the class certification.

11 MS. FEGAN: Yes.

12 MR. LEWIS: Your Honor, Richard Lewis. May I be heard
13 on this? Thank you, your Honor.

14 I think counsel for the Arrington parties have
15 demonstrated my point. The NCAA has made clear that they're
16 only going to negotiate for the global class of living football
17 players, which includes, which explicitly includes, the older
18 players who played 2000 -- before 2004, and specifically
19 includes all 50 states, including the 32 excluded by the
20 Arrington class definition.

21 The case law makes clear that when an intra-class
22 conflict is fundamental -- and nothing could be more
23 fundamental here because this is a medical monitoring case.
24 The 23(c)(4) class that counsel refers to provides no relief
25 whatsoever. It seeks a declaratory judgment on negligence.

1 We're trying to get relief. We're trying to get
2 medical testing for the older players now before it's too late.
3 We don't want to be put in the back of the line or told that we
4 are not the best foot to put forward. We believe the NCAA is
5 only going to sit down to negotiate settlement once. And under
6 Amchem, those older players must have adequate representation
7 at the table, not afterwards, to file an objection about what
8 might have happened if they did have adequate representation.

9 Arrington counsel in federal pleadings has said that
10 the claims of the former players, who played before 2004, lack
11 merit. They can't go into negotiation and represent the same
12 clients who they say their claims lack merit. They had a class
13 representative, Mr. Turner, who played before 2004. They
14 dropped him when they moved for class cert.

15 MS. FEGAN: That's incorrect.

16 THE COURT: Counsel, let's -- they are kind of
17 chomping at the bit.

18 Yes, go ahead.

19 MR. MESTER: Your Honor, there isn't a conflict. The
20 settlement is being negotiated with all medical -- all athletes
21 will be eligible for medical monitoring. There is no
22 discrimination. There is none of the things that Mr. Lewis --

23 THE COURT: So all athletes regardless of when they
24 played.

25 MR. MESTER: Exactly right, your Honor. And if the

1 Court has any questions with regard to that, I am sure Judge
2 Phillips will be happy to confirm that. That is absolutely
3 what we negotiate from the outset in this litigation.

4 So the purported conflict that Mr. Lewis keeps
5 referring to simply doesn't exist. There is no need for anyone
6 else at the table because these athletes will be fully
7 represented and adequately represented.

8 MR. EDELSON: Your Honor, I'm sorry. I didn't mean
9 to --

10 THE COURT: Go ahead.

11 MR. EDELSON: I felt I had to say something. The --
12 we haven't talked at all about the real claims here, which is
13 the personal injury claims.

14 THE COURT: We are getting to that, I'm sure. I am
15 sure we are going to get to that.

16 MR. EDELSON: But the idea that there is someone at
17 the table who is bargaining for rights of the personal injury
18 class -- class members is -- is, with respect --

19 THE COURT: I think that that's -- but I think that's
20 specifically what they are not doing.

21 MR. EDELSON: Your Honor, they are. If you read their
22 brief, so it's been difficult, because --

23 THE COURT: Well, let's try to clarify that now, to
24 the extent one can. I realize this is a public forum. I don't
25 want to get too involved into the nuances, the minutia, of

1 those discussions, at least at this point in time.

2 But let me ask you this: With regard to the
3 settlement or as intended, what happens to the monetary claims,
4 the personal injury claims?

5 MR. MESTER: Those are preserved, your Honor. They
6 are not being resolved on a class basis. Those are preserved.

7 MR. EDELSON: That --

8 MR. MESTER: May I finish?

9 So class members will have the right to pursue those
10 claims to the extent they feel that they -- that they want to
11 or need to, and that they will not be affected by the
12 settlement.

13 THE COURT: Does that answer your question?

14 MR. EDELSON: Well, they've been very slippery. Can I
15 just ask a clarification?

16 What -- my understanding, based on their papers, is --
17 is that the -- that the class members will be releasing the
18 right to bring class personal injury claims. If that's true,
19 that affects it. If not, if they changed their mind and there
20 will be no effect and everyone can move forward, then I can
21 step down and I don't have to keep speaking.

22 THE COURT: Well, I presume -- and perhaps I shouldn't
23 but I presume that when you say that the class members would
24 be -- that their monetary claims would be preserved is that
25 those monetary claims can themselves, if the Court will certify

1 them, be certified in a class matter.

2 MR. MESTER: One of the elements of settlement, your
3 Honor, they would need to be pursued on an individual basis,
4 not on a class basis. And, your Honor, I will be very candid.
5 The reason for that, we don't think those claims are properly
6 certifiable in the first place under Amchem.

7 MR. EDELSON: How can they negotiate --

8 THE COURT: Hold on. Okay.

9 So with regard to the Walker plaintiffs, what is the
10 release that you are seeking in your motion?

11 MR. LEWIS: Your Honor, with regard to the Walker and
12 Morgan plaintiffs and the joinder motions, we seek specific
13 representation in the negotiation for players who -- football
14 players, NCAA football players, who played prior to 2004, and
15 NCAA football players to played in the 32 states. Both of
16 those subgroups are excluded by the Arrington medical
17 monitoring class motion.

18 And after the motion, when challenged, they defended
19 their exclusion and said they were right on the merits because
20 there was no consensus about concussion management before 2004,
21 so we should exclude them. And because medical monitoring law
22 doesn't recognize this claim in 32 states, so we should exclude
23 the other group of hundreds of thousands of football players.

24 Both of those groups cannot be adequately represented
25 by the very lawyers who have stated in their own pleadings that

1 their claims lack merit, and then they dropped the class rep
2 who stood for that claim.

3 THE COURT: Mr. Lewis, let me ask you this: How
4 extensive of talks have you had with Hagens Berman with regard
5 to this process? Has that discussion been ongoing?

6 MR. LEWIS: Your Honor, let me -- let me address that.
7 We have made specific efforts to first speak to the mediator.

8 THE COURT: Okay. That's not my question. My
9 question --

10 MR. LEWIS: We have not had a direct conversation with
11 Hagens Berman. They have said repeatedly in their papers that
12 we are copycat lawyers who have nothing to offer the class, and
13 that our case should be dismissed, and we should be thrown out
14 of this litigation. So that was not an invitation to us to try
15 and confer and reach an agreement.

16 MS. FEGAN: If I could speak to that. Rather than
17 reaching out to us about their concerns, they filed a
18 complaint. They were the first on file in the Eastern District
19 of Tennessee in September of last year, of 2013. On the day
20 that they filed their complaint, they filed a motion for
21 appointment as lead counsel before the Eastern District of
22 Tennessee.

23 So rather than coming to us or coming to this Court or
24 to the NCAA, frankly, and voicing concerns, they tried to pull
25 a fast one. In fact, they filed their motion for appointment

1 of lead counsel before summons had even issued to NCAA.

2 So we immediately, rather than have this duel, we
3 immediately sought to intervene there so that we could
4 participate in whatever discussions were going on. But they've
5 never attempted -- in fact, they called the mediator to ask for
6 information multiple times. It's been a very bizarre process.

7 That being said, your Honor, I would like to clarify
8 couple things. Mr. Turner was not dropped at the time of our
9 motion for class certification. He was a plaintiff that was in
10 very early and disappeared. So there was a point in time when
11 he did not want to be involved, which is a different issue than
12 the nefarious accusations that are being made at this point.

13 But I certainly think there is a contradiction in what
14 they're saying because they're saying that there has been no
15 adversarial process in the context of the class motion. And
16 yet it's the class motion on which they are trying to hang
17 their hat.

18 So I think looking at the full record here, the second
19 amended complaint is clearly the complaint at issue. It's the
20 complaint on which full merits discovery was completed. And we
21 did exactly what their firm has done multiple times in seeking
22 a narrowed class at the time of the class motion.

23 The Third Circuit did touch on this, and I just want
24 to bring this to the Court's attention. In Sullivan versus DB
25 Investments, it was an antitrust case. And there it involves

1 indirect purchaser states, where there is only a limited number
2 of indirect purchaser states where indirect purchasers can
3 bring antitrust actions.

4 But there the plaintiffs settled a 50-state class
5 because at some point the defendant wanted global resolution
6 and peace. And the objectors came in and said, oh, no, you
7 can't do that. You can't go from this more narrowed class to a
8 broader class.

9 And the Third Circuit in a very, very considered
10 opinion and long opinion said, no, that's not right, because
11 the consideration of the settlement class is different than
12 consideration of the litigation class. And there the Third
13 Circuit fully analyzed the reasons why a defendant would want
14 to when it sat down sit down not with multiple different pieces
15 and multiple different people but sit down in one place and
16 achieve global peace.

17 So I would ask that the Court consider that opinion.

18 THE COURT: Let me ask the NCAA this: And I am sorry,
19 your name is again?

20 MR. MESTER: Mark Mester, your Honor.

21 THE COURT: You said that the next mediation
22 settlement is tomorrow.

23 MR. MESTER: Yes, your Honor.

24 THE COURT: And that it was difficult to schedule. Is
25 there any particular reason it has to be tomorrow?

1 MR. MESTER: Really, your Honor, difficulty in
2 scheduling. Judge Phillips' schedule is quite tight. So we
3 had difficulty getting time from him. And his assistant Ms.
4 Sperber who has been working with us. And then the other issue
5 is the multitude of carriers and their counsel, all of whom
6 will be present for this, and their schedules. These are not
7 easy things to get scheduled.

8 THE COURT: All right. The reason being is that it
9 seems to me that it would be very valuable for the respective
10 plaintiffs' counsel to get together and to at least start
11 talking about what has been going on in the mediation, and to
12 try to get that dialogue going, particularly given my
13 inclination to appoint two lead counsel in this case. I think
14 that providing the various attorneys who represent their
15 plaintiffs in various putative classes to start talking about
16 how they want to pursue this case, how they think this case
17 should be outlined, including the mediation, the status of the
18 mediation, how the mediation should go and those issues, and
19 give them room to do that, I think would be very beneficial.
20 And actually that's what my order provides for counsel to have
21 those discussions.

22 Yes?

23 MS. FEGAN: You know, my only concern, one of my
24 concerns, is that we are under a confidentiality agreement, and
25 our discussions have been pursuant to Rule 408. And --

1 THE COURT: Well, given the fact that -- well, let me
2 ask the NCAA this: Given the fact you have all these other
3 pending cases against you, do you have any objections to
4 plaintiff at least sharing -- plaintiffs' counsel amongst
5 counsel in this case of record sharing what's the development
6 of the mediation process?

7 MR. MESTER: Your Honor, we have no objection provided
8 that too is covered by Rule 408. I would say, though, that we
9 have spent a lot of time and effort negotiating with the Berman
10 firm and the Siprut firm. We have some momentum. I think
11 bringing someone in as a full-fledged negotiator at this point
12 very late in the day would be -- would be disruptive. I think
13 it would make settlement frankly less likely. But --

14 THE COURT: I would also say that it might also make
15 the path to settle, the finalization and approval of
16 settlement, a bit smoother, right? And so you have to weigh
17 that as well. It's one thing to strike a proposed deal. It's
18 another thing to get the deal approved.

19 MR. MESTER: Understood, your Honor.

20 THE COURT: So I take it that -- I understand that
21 there was a lot of effort to try to get tomorrow's date
22 scheduled. But I take it there is no particular deadline or
23 time pressures why it has to be tomorrow versus sometime later
24 in the future?

25 MS. FEGAN: Your Honor, I think -- well, I just would

1 say that we paid \$48,000 to secure Judge Phillips' time and
2 that's nonrefundable. That's going forward. There is people
3 in the air as we speak. I think that there is probably more
4 than 20 lawyers in there as we speak going to New York.
5 Significant costs and time.

6 And so, you know, it's -- I think the other urgency
7 here, to the extent that there is urgency, is really just in
8 that, you know, this case, while they filed so late, it really
9 should not start over from the beginning.

10 THE COURT: It's not going to start over from the
11 beginning. I can tell you that right now. I mean, one of the
12 reasons why the JMDL sent it here was precisely because of the
13 developments in the Arrington case. And certainly to the
14 extent that there has been discovery done in Arrington and what
15 not, my anticipation is the parties use that discovery to the
16 fullest extent possible and not duplicate anything that's
17 already been done. I think that is consistent with the MDL
18 order and why it was transferred here in the first place.

19 So I have no intentions of starting over from the
20 beginning. Okay?

21 MS. FEGAN: Your Honor, may I make one more point
22 about tomorrow? I don't think -- I could be wrong and I think
23 there are some carriers' counsel in the room. I don't think we
24 are going to reach final agreement tomorrow. But I think to
25 stop the process and to have the carriers walk away and think

1 that, you know, we're going back or the machine is working
2 backwards I think would be very detrimental to ultimately what
3 everybody is seeking in this room, which is a medical
4 monitoring class that's going to provide very real and valid
5 relief to the student athletes.

6 So I do ask for that reason that it go forward. And
7 we will, as you have suggested, be in touch and figure out a
8 way to have meaningful talks with co-counsel.

9 THE COURT: Is it scheduled just for the day? How
10 long?

11 MS. FEGAN: Two days.

12 MR. MESTER: Two days.

13 THE COURT: Two days?

14 MR. LEWIS: May I be heard on this?

15 THE COURT: Briefly, Mr. Lewis.

16 MR. LEWIS: Yes, your Honor. Of course, we are
17 available to immediately confer with other plaintiffs' counsel
18 or defense counsel. We will do that.

19 We did bring this problem to the Court's attention in
20 a letter in November. And in early November this Court asked
21 counsel if the Tennessee folks -- there is a transcript
22 attached to the NCAA opposition to our motion, where counsel
23 was asked if the Tennessee folks were going to be part of the
24 ongoing mediation. And the answer from Arrington counsel was,
25 only Arrington counsel are involved.

1 But the fundamental question is not about the lawyers.
2 It's about representation of the Tennessee plaintiffs and the
3 interest they represent, which is the players before 2004 and
4 in the other 32 states. We have not been part of the process.
5 We brought this problem to this Court's attention in early
6 November. We've been excluded since that time.

7 And under the adequacy requirements of Amchem, this is
8 a fundamental intra-class conflict. And I really think that
9 for these -- this mediation to be success, it has to deal with
10 that. And -- and sweeping it under the rug or pushing it off I
11 don't think is going to help.

12 THE COURT: What I am hearing, though, is that the
13 settlement that at least currently is contemplated would
14 address all of those people and the proposed settlement class
15 that -- and I say proposed because it has to be certified,
16 obviously, by the Court -- would include those people. So if
17 that is counsel's intent, then Hagens Berman is basically
18 representing all of those putative -- potential putative class
19 members and the class members that they set forth in their
20 amended complaint.

21 MS. FEGAN: That's right, your Honor. And Amchem
22 deals with the situation where you have personal injury
23 claimants and claimants who are seeking property damage or
24 future injury, all from the same pot. That's not what we are
25 doing here. So there is no intra-class conflict. We are

1 treating all of the players, whether they are football or
2 Lacrosse or wrestling -- there is multiple concussion-type
3 sports -- exactly the same, because they all deserve the type
4 of medical monitoring relief that we're seeking.

5 THE COURT: Okay. Very well. This is what we are
6 going to do. With regard to the mediation that's scheduled for
7 tomorrow, you can go ahead and proceed, particularly given the
8 fact that counsel states that the prospects of it being the
9 final session or there being a final deal struck is not very
10 likely. But I think that that momentum would be helpful.

11 With regard to the Walker and Morgan plaintiffs'
12 motion for temporary -- for a TRO basically for a seat at the
13 table and participation in the mediation process, I am going to
14 provide the NCAA and the Arrington plaintiffs and anyone else
15 frankly that wants to respond an opportunity to respond to the
16 motion.

17 So today is the 5th. I do want to take it up in short
18 order and actually want to take it up as part of the initial
19 pretrial conference on the 5th, so we can get it all wrapped
20 up. So how much time do you need to respond?

21 MS. FEGAN: 14 days?

22 THE COURT: That's fine. You said 14. I'll agree.
23 So February 19 should be the response date. Okay.

24 Any reply, you don't have to file a reply. I am
25 feeling you won't need it. But if you are going to file one,

1 you should file one by the 26th, and I will limit that to five
2 pages.

3 MR. LEWIS: Thank you, your Honor.

4 THE COURT: Okay. And as I said, we will take this up
5 as part of the initial pretrial conference.

6 MS. FEGAN: May I ask just now just for housekeeping
7 matter, could we have the same 25 pages response?

8 THE COURT: Yes, I thought that was the agreement.
9 But, yes, you may.

10 MS. FEGAN: Thank you.

11 THE COURT: And to the extent that the -- I guess I
12 prefer just as a matter of my review, a consolidated response,
13 but I recognize that might be slightly awkward. So I will let
14 you use your own best judgment with regard to that. But
15 perhaps if you could try not to repeat any arguments, that
16 would be helpful.

17 MS. FEGAN: Thank you.

18 THE COURT: There is no need to actually use all 25
19 pages.

20 MR. MESTER: Understood, your Honor.

21 THE COURT: In the meantime, prior to -- as I said,
22 the case management order No. 1 will go out today. It does
23 order plaintiffs' counsel, all of plaintiffs' counsel, to meet
24 and to confer about a number of issues, including the
25 settlement process, okay, as well as, as I said, sets forth a

1 procedure by which the Court can appoint lead counsel. I will
2 say this, as I said, the Court at this point anticipates two.
3 However, if the plaintiffs agree that there might be a
4 different format that might work better, that's something that
5 I would also consider.

6 MR. LEWIS: Your Honor, one request for clarification.
7 On the confidential 408 settlement materials, do I understand
8 that we can have access to any documents or written materials
9 that are being used in those confidential 408 settlement
10 negotiations, as long as we agree to treat them under 408 as
11 confidential?

12 THE COURT: I guess, I am going to leave -- with
13 regard to that, I am not going to give you the right to access
14 it. You can certainly request it. And I think that it is
15 probably in the interests of Hagens Berman and the NCAA to
16 provide some sort of disclosures to the extent it might be
17 helpful in the discussions, because obviously to the extent
18 that people are appointed as lead counsel, the next question
19 is, will all lead counsel be able to participate in the
20 mediation? At this point the inclination is probably yes.
21 Okay. So keep that in mind as you go forward.

22 As I said, the reason is that you are going to -- if
23 there is a proposed settlement, you are going to have to deal
24 with whatever concern the rest of the class has sooner rather
25 than later. So in my estimation, Judge Phillips probably

1 agrees, probably sooner is better.

2 So that's my ruling on that. So, no, you don't have
3 the right to it. But I certainly anticipate that's part of the
4 process to the extent that that documentation might be helpful
5 in those discussions, that the parties can come to some sort of
6 agreement as to that.

7 MR. LEWIS: Thank you, your Honor.

8 THE COURT: Okay. All right. Is there anything else
9 that we need to address today?

10 MS. FEGAN: That's all.

11 THE COURT: Very good. Thank you.

12 MR. EDELSON: I'm sorry, your Honor. I thought you
13 were going to get to our intervention. We are just not sure
14 where our place is here.

15 THE COURT: I am giving some thought to that. You can
16 participate in the initial pretrial conference. As far as the
17 motion for intervention, that's something that I am going to
18 deal with and I will deal with as part of the case management
19 order that comes out today.

20 MR. EDELSON: Your Honor, if it's okay, we'd like to
21 also participate in the briefing of this issue.

22 THE COURT: That's not necessary. I will have more
23 than sufficient briefs on the issue.

24 MR. EDELSON: Well --

25 THE COURT: The answer is no.

1 MR. EDELSON: Thank you, your Honor.

2 THE COURT: Very good. Thank you.

3 MS. FEGAN: Thank you.

4 (Which were all the proceedings had at the hearing of the
5 within cause on the day and date hereof.)

6 CERTIFICATE

7 I HEREBY CERTIFY that the foregoing is a true, correct
8 and complete transcript of the proceedings had at the hearing
9 of the aforementioned cause on the day and date hereof.

10

11 /s/Alexandra Roth

2/6/2014

12 _____
Official Court Reporter
U.S. District Court
13 Northern District of Illinois
Eastern Division

Date

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